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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-857

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS *CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Motion for Leave to File Brief As *Amicus Curiae* ..	iii
Interest of The Authors League	1
Summary of Argument	2
Preliminary Statement	2
POINT I—As a work of serious literary and artistic value (and therefore of redeeming social value) CARNAL KNOWLEDGE cannot be adjudged obscene	3
POINT II—The Court must prevent censorship by uncertainty	6
POINT III—"Local" community standards cannot be applied under the *Miller* standard	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

PAGE

Jacobobellis v. *Ohio*, 378 U.S. 184 6

Miller v. *California*, 41 LW 4925 .....2, 3, 4, 5 passim

Paris Adult Theater I v. *Slaton*, 41 LW 4937 8

United States Constitution

First Amendment .....3, 4, 5, 6 *passim*

Other

SATURDAY REVIEW, July 3, 1971, p. 18 4

AMERICA, July, 1971, p. 48 4

READERS GUIDE TO PERIODICAL LITERATURE, March 1971-February 1972, p. 764 5

NEWSWEEK, July 5, 1971, p. 71 5

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions the Court for leave to file the annexed brief *amicus curiae*. The League is a national society of professional authors and dramatists. Many of its members write screenplays; and many books and plays by its members are adapted for the screen. The author of the screenplay for the film CARNAL KNOWLEDGE, Jules Feiffer, is a member of the Authors League, and a distinguished writer and artist. One of the principal purposes of the Authors League is to express the views of its members in cases involving freedom of speech and press; and the freedom to read books and view films and plays. The decision of the Supreme Court of Georgia drastically curtails these freedoms, and restricts the constitutional rights of authors, screenwriters, direc-

tors and film producers. It is particularly important that the Court review that decision because it misapplies the guidelines announced in *Miller* v. *California* in two fundamental respects. Allowed to stand, the Georgia decision will result in the suppression of many films of literary and artistic value which are entitled to First Amendment protection.

Therefore, the Authors League respectfully seeks the Court's permission to file the annexed brief *amicus curiae*. The attorneys for the Appellant have consented to the filing of this brief. The attorneys for the appellee have refused, in response to the League's request, to consent to its filing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

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ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Several of them write screenplays; and many books and plays by its members are adapted for motion pictures. One of the League's principal purposes is to express the views of its members in cases involving freedom of speech and press, and the freedoms to read books and view plays and films. The decision of the Supreme Court of Georgia drastically curtails these freedoms, and restricts the constitutional rights of authors, screenwriters, directors and film producers.

Summary of Argument

I. The serious literary or artistic value of a work cannot be judged by community standards. CARNAL KNOWLEDGE is such a work, having been evaluated by professional critics as a genuine effort at literary and artistic expression. A work which receives such recognition has sufficient "value" to entitle it to First Amendment protection regardless of its alleged prurient interest or patent offensiveness.

II. The Court must prevent censorship by uncertainty. Prior civil determinations of obscenity should be required. The meaning of "serious literary or artistic value" must be clarified to prevent any prosecution of films like CARNAL KNOWLEDGE which clearly possess such values. The most effective guidance, and meaningful First Amendment protection, can be provided under the "willing adult" standard proposed by Justices Brennan, Stewart and Marshall.

III. "Local" standards for determining prurient interest or patent offensiveness cannot be applied under *Miller* v. *California*.

Preliminary Statement

We agree with Appellant that Sec. 26-2105 (Ga. Code Ann.), which prohibits the exhibition of films that contain acts that would be "public indecency" under Sec. 26-2011, is unconstitutional on its face, and as applied to CARNAL KNOWLEDGE, and as construed by the Supreme Court of Georgia. We also agree that Appellant was denied due process; *inter alia*, because he was not charged with two offenses on which his conviction may have rested.

In this brief, we address ourselves to the remaining issues: (I) Whether CARNAL KNOWLEDGE is constitution-

ally protected under the *Miller* v. *California* guidelines; and under the *pre-Miller* standards of the Georgia statute, and this Court; (II) Whether the *Miller* guidelines permit censorship by uncertainty; and (III) Whether prurient interest and patent offensiveness can be judged by "local" community standards.

POINT I

As a work of serious literary and artistic value (and therefore of redeeming social value) CARNAL KNOWLEDGE cannot be adjudged obscene.

CARNAL KNOWLEDGE does not appeal to prurient interest and is not patently offensive in depicting sexual conduct. But the right of adults to see the film in Albany County, Georgia, does not depend on an analysis of these first two elements of the *Miller* guidelines. CARNAL KNOWLEDGE is entitled to First Amendment protection in Albany County and throughout the United States because it is a work of serious literary and artistic value. It therefore satisfies the "minimum" which entitles even prurient, patently offensive works to "merit First Amendment protection" under *Miller* v. *California*. 41 LW 4928. And because it has these values, it is also entitled to protection under the "redeeming social value" test of the Georgia obscenity law.

Under *Miller*, the serious literary or artistic value of a work is not to be judged by "community standards", local or state. An Albany county jury might determine that LADY CHATTERLY'S LOVER or ULYSSES were prurient, patently offensive works, lacking serious literary or artistic value—and the Supreme Court of Georgia might affirm that result. But certainly this Court would reverse the

conviction under *Miller* since both novels are works of "serious" literary and artistic value; although scholars and critics may differ as to the degree of "value", some hailing the novels, others believing they are considerably less than masterpieces. Both have such value because they are genuine ("serious") literary or artistic "expressions". (41 LW at p. 4927); they cannot be dismissed as hardcore pornography seeking redemption with "A quotation from Voltaire in the flyleaf . . ." (41 LW at 4928 n. 7). The motion picture is an art form no less complex or sophisticated than literature, the stage or painting. Twelve jurors bring no greater aesthetic expertise to CARNAL KNOWLEDGE than they would to ULYSSES, WAITING FOR GODOT or LES DEMOISELLES D'AVIGNON. And under the First Amendment these works would still have serious literary and artistic value in Maine, Mississippi and Georgia even if juries in Bangor, Biloxi or Albany ruled to the contrary.

CARNAL KNOWLEDGE is a work of serious literary and artistic value:

> "Not only is the film, overall, the best acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra-liberated cinematic times." SATURDAY REVIEW (Hollis Alpert); July 3, 1971, p. 18.
>
> "Obviously, the film is not for everyone, but it struck me as Nichols' most controlled piece of direction, bringing a mature perspective to a funny, bitter deeply probing examination of immature behavior." AMERICA ("Published by Jesuits of the United States and Canada") July, 1971, p. 48.

These are two of the fourteen national magazine reviews of CARNAL KNOWLEDGE indexed by READERS GUIDE TO PERIODICAL LITERATURE for March 1971-February 1972. (p. 764) Some critics agreed with Mr. Alpert's highly favorable judgment; as Appellant's brief notes, the film appeared on the "10 Best Films" lists of several reviewers. Other reviewers were less favorably impressed; Paul D. Zimmerman's review in NEWSWEEK concludes "what might have been a great film survives simply as a very good one." July 5, 1971; p. 71. What is significant is that all of the reviewers considered, and evaluated, CARNAL KNOWLEDGE as a film of serious literary and artistic value. They considered it a genuine effort at literary and artistic expression, regardless of their differing evaluations of its success in realizing its aesthetic objectives. These reviews, and others in newspapers across the country, reflect Judge Hawes' view that "Certainly (CARNAL KNOWLEDGE) is not the kind of hard-core pornography we removed from public consumption in *Slaton* v. *Paris Adult Theater I*."

We do not contend that professional critics are infallible arbiters of literary or artistic value. Sometimes they have failed to perceive these values in works whose merits were later widely hailed. And we do not believe that any work should be convicted of obscenity on the basis of critics' reviews. But there is a strong presumption in favor of First Amendment protection for books, films and other works. Consequently, when recognized, professional critics—in their reviews—consider that a film or book is a genuine work of literary or artistic expression then, we submit, it has sufficient "value" to entitle it to First Amendment protection under the third Miller guideline (and therefore, under Georgia's "redeeming social value" test). We believe

that the view of even a minority of such critics is sufficient to establish that "value" for First Amendment purposes.

At the very minimum, these spontaneous, unsolicited evaluations by some professional critics should create a presumption of "value" which appellate courts must explicitly and convincingly overcome when they deny First Amendment protection to a book or film. Here, the majority of the Georgia Supreme Court ignored the views of professional critics, called to its attention in Justice Gunther's dissenting opinion. The majority made no attempt to explain or support its subjective conclusion that CARNAL KNOWLEDGE was "obscene". It also ignored the fact that 43% of the Court made "an independent constitutional judgment on the facts of the case"* that CARNAL KNOWLEDGE was not obscene. Had that proportion of the jury reached the same conclusion, there would not have been a conviction.

POINT II

The Court must prevent censorship by uncertainty.

Here, Billy Jenkins was convicted and sentenced for making the same judgment reached by three justices—43%—of Georgia's highest court. He thought CARNAL KNOWLEDGE was not "obscene". But his failure to correctly predict how a jury would evaluate the film, and its literary and artistic value, subjects him to serious penalties. Most theatre owners cannot risk predicting whether controversial films will be ruled obscene, after they have exhibited them. Aside from the risks of jail and fine, they cannot afford the heavy financial burdens of a prosecution or appeal even if they ulti-

* *Jacobobellis* v. *Ohio*, 378 U.S. 184, 190.

mately prevail. Consequently many theatre owners will not exhibit non-obscene films that are controversial, and can be coerced by threats of prosecution into rejecting films of serious literary and artistic value that are entitled to protection under the *Miller* guidelines.

Motion picture producers, in turn, cannot risk substantial investments in film that will be barred from exhibition in many parts of the country by such self-censorship and grass-roots censorship. Consequently authors and directors are prevented from creating works of genuine literary and artistic value; and adults who choose to see such works are denied the right to view them.

As we have advised the Court, in an *amicus curiae* brief filed in *Kirkpatrick & Dargis* v. *People of the State of New York* (No. 73-104), the Authors League believes that one safeguard needed to prevent wide-spread suppression of non-obscene books and films is the requirement of a prior civil adjudication that a work is obscene, before a theatre owner, book seller or librarian can be criminally prosecuted for exhibiting or distributing it.

Furthermore, we believe that this Court must require adequate guidance to theatre owners and booksellers who are obliged to apply the *Miller* standards. No theatre owner in Georgia could determine, from the CARNAL KNOWLEDGE decision what elements of the film impelled 4 justices to reach the astounding conclusion that the film as a whole was prurient, that it was patently offensive, and—most astounding of all—that it lacked serious literary or artistic value. Thus no theatre owner could determine whether the next film challenged by local prosecutors would suffer the same fate at the hands of the Georgia court's majority. And few

can afford to risk finding out. The uncertainty produces a most effective tool of censorship—against theatre owners, motion picture producers and adult audiences.

Certainly the majority opinion of the Georgia Supreme Court indicates the urgent need for this Court to provide further guidance to state courts and prosecutors on the subject of serious literary and artistic value. The meaning of the term should be made clear enough to dissuade them from permitting any prosecution of a film such as CARNAL KNOWLEDGE which obviously possesses these values. If they cannot do this, the *Miller* guidelines inevitably will permit the erosion of First Amendment rights through the process of self-censorship and grass-roots censorship described above, and in our *amicus curiae* brief in *Kirkpatrick & Dargis* v. *The State of New York*.

The most effective method of providing adequate guidance, and meaningful First Amendment protection is stated in Justice Brennan's opinion in *Paris Adult Theater I* v. *Slaton*, (41 LW at 4955). If a theatre owner had any doubts about a film's status under a statute protecting juveniles, he would prevent them from entering the theatre (as is now done). If he had any doubts about a film's status under a "thrusting" statute, he would avoid advertising or displays that might intrude offensive materials on unwilling adults. But he could not be prevented, by threats of prosecution (or self-censorship born of uncertainty), from exhibiting films of literary and artistic value to adults who chose to see them—for the exhibition of a film, "obscene" or not, to adults willing to see it could never be prosecuted as a crime.

POINT III

"Local" community standards cannot be applied under the *Miller* standard.

The majority opinion of the Georgia Supreme Court construes *Miller* v. *California* as permitting the application of local, as distinguished from state, community standards in determining whether a work appeals to prurient interest, or is patently offensive in its depiction of sexual conduct. We believe that this Court sanctioned only the application of state-wide community standards. [*e.g.*, in its preamble to the statement of the guidelines, this Court stressed the need to carefully limit "state statutes"; to define proscribed conduct by "the applicable state law", and to limit a "state offense" to works failing the three tests of the *Miller* standard. (41 LW 4927).]

There are thousands of local communities in the United States. If a work's alleged prurient interest or patent offensiveness can be judged separately under the "standard" of each community in which it is distributed, producers and publishers would be compelled to eschew non-obscene books and films likely to arouse any opposition because of sexual themes. They could not afford to risk the loss of several markets, or the cost of defending the many prosecutions that could be instituted or threatened under such a crazy-quilt system of local censorship. We respectfully urge the Court to make it clear on this appeal that only state-wide community standards can be applied under *Miller* v. *California*.

CONCLUSION

It is respectfully submitted that Probable Jurisdiction should be noted.

Respectfully submitted,

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